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No. 84-1602

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,
Petitioners,

vs.

LIBERTY LOBBY, INC. and WILLIS A. CARTO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS, AND BRIEF OF AMICI CURIAE THE SYNANON CHURCH AND CHARLES E. DEDERICH IN SUPPORT OF POSITION OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS

The Synanon Church and Mr. Charles E. Dederich hereby respectfully move for leave to file the attached brief *amici curiae* in this case.

The *amici* are petitioners in a libel case now pending before this Court on petition for writ of certiorari, entitled *The Synanon Church, et al. v. Reader's Digest Association, Inc. et al.*, No. 84-1304 (hereinafter, "*Synanon v. RDA*"). The issue of the proper standards to be applied in a motion for summary judgment in defamation cases is one of the issues specifically presented by *amici*'s petition. Resolution

of this issue could have a direct and immediate effect on *amici*'s petition and, therefore, *amici* have a real and continuing interest in the present case. For example, the decision of the California Supreme Court could be reversed based on a decision in this case. The relationship between the issue in the present case and the issues presented in *amici*'s petition is underscored by the fact that Reader's Digest Association, Inc., one of the respondents to *amici*'s petition, has submitted a motion for leave to file a brief of *amicus curiae* in this case. (It should be emphasized that while resolution of the issue in this case will resolve an important issue in *amici*'s case, any resolution of this case's issue will still leave what *amici* contend are many serious errors and confusions in the California Supreme Court decision in *Reader's Digest Assn. v. Superior Court*, 37 Cal.3d 244, 208 Cal.Rptr. 137, 690 P.2d 610 (1984). Therefore, *amici* submit that their petition for certiorari should be granted regardless of the outcome of this case.)

A second way in which petitioners have an interest in this matter arises from the various references made to *amici* in the briefs already filed in support of petitioners in this action. These briefs attempt to bolster their arguments by disparaging the character and good name of *amici*, including references such as "Synanon's deliberate use of litigation to 'chill' the media" (*Reader's Digest* Brief, p. 8) and the characterization of Synanon as filing defamation

actions "to stifle adverse comment" (Media *Amici* Brief, p. 26).[1] The allegations made about Synanon and Mr. Dederich are false and are frequently based upon unsubstantiated newspaper reports or no citation at all. To the extent that petitioners in this case are attempting to support their position by attacks on the character of *amici*, *amici* have a direct and real interest in having their points heard.

The facts and questions of law which *amici* wish to address focus on how petitioners and their supporters are asking for a new and extraordinarily high protection at the summary judgment stage, which has no justification and which will cause great difficulties. The attached brief corrects many of the erroneous factual and legal arguments of petitioners and their supporters. Blatant misstatements — as, for example, the false claim that there is "virtual unanimity" among the various jurisdictions regarding petitioners' proposed rule — demonstrate the fundamental errors of petitioners and their supporters in the media industry who wish to establish extraordinary rules favoring them as litigants.

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[1] The relevant petitions and briefs before this Court will be referred to herein as follows: Petition for Writ of Certiorari in *Synanon v. Reader's Digest Association, Inc.*, hereinafter "Synanon Pet. for Cert."; Brief for Petitioners, *Anderson v. Liberty Lobby*, hereinafter "Pet. Brief"; Brief of *Amicus Curiae*, the Reader's Digest Association, Inc., in Support of Petitioners, hereinafter "*Reader's Digest* Brief"; and, Brief *Amici Curiae* of American Newspaper Publishers Association, et al., hereinafter "Media *Amici* Brief."

For these reasons, The Synanon Church and Mr. Dederich respectfully request that this motion for leave to file a brief *amici curiae* be granted.

Respectfully submitted,

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BRIEF OF AMICI CURIAE THE SYNANON CHURCH AND CHARLES E. DEDERICH IN SUPPORT OF POSITION OF RESPONDENTS

This brief is respectfully submitted, pursuant to Rule 36 of the Rules of this Court, urging affirmance of the decision below of the United States Court of Appeals for the District of Columbia Circuit, on the grounds that (1) no special procedural rules are mandated at the summary judgment level in defamation cases by the First Amendment and (2) this Court should explicitly state that, as in other cases where state of mind is in issue, summary judgment is

a disfavored remedy to resolve a disputed issue of actual malice in a defamation case.[2]

SUMMARY OF ARGUMENT

Petitioners' position is in error because there is no constitutional mandate for a particular standard of proof at the summary judgment stage in a defamation action. This Court's decision in *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), did not create such a rule, and subsequent decisions have stated that application of the *New York Times* requirements at pretrial stages would be an impermissible form of "double counting." Nothing in the First Amendment requires a clear and convincing evidence standard for resolving summary judgment motions in defamation actions.

In contrast, it is respectfully submitted that it is now necessary for this Court to hold explicitly what it has suggested in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Calder v. Jones*, __U.S__, 104 S.Ct. 1482 (1984): Summary judgment on the actual malice issue is a disfavored remedy, because issues of state of mind are generally unsuitable for summary disposition. The rights of defamation plaintiffs to clear their names make it essential that no new, extra constitutional hurdles be placed in their ability to take their cases to juries.

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[2] The abbreviations used herein for briefs are set forth in Footnote 1, *supra*, at p. 3.

ARGUMENT

I

THE STANDARD OF PROOF ON A MOTION FOR SUMMARY JUDGMENT IS NOT MANDATED BY THE FIRST AMENDMENT

Previous Analysis by This Court

The petitioners and *amici curiae* in support of petitioners misstate the question before the Court. The proper question raised from the decision in *Liberty Lobby v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *cert. granted*, __U.S.__, 105 S.Ct. 2672 (1985), is whether the First Amendment mandates the special procedural protection that a party opposing a motion for summary judgment in a libel case must prove the defendant's actual malice by clear and convincing evidence.

Petitioners assert that in defamation cases there should be a constitutional mandate under the First Amendment requiring the special procedural protection of a higher standard of proof in opposing a motion for summary judgment. Petitioners' position is unique. Even where a higher standard of proof than a preponderance of evidence is required at trial, the standard of proof in a motion for summary judgment in such cases is uniformly left to the individual jurisdictions.[3]

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[3] Petitioners and supporting *amici* have cited some cases in which various jurisdictions have elected to impose a heightened standard of proof at the summary judgment stage when a higher burden is required at trial. However, contrary to their repeated implications, this is far from a universal rule. Many jurisdictions do not impose a heightened

standard, as a few examples show. See, e.g., *Webbe v. McGhie Land Title Co.*, 549 F.2d 1358, 1360 (10th Cir. 1977) [while clear and convincing evidence is required to overcome the presumption that a deed is valid, "[w]hether the quantity and quality of evidence offered is sufficient to overcome such presumption is to us a matter which cannot be satisfactorily resolved by summary judgment"]; *Attorney General of the United States v. Irish People*, 595 F.Supp. 114, 116-117 (D.D.C. 1984) ["Plaintiff argues that because the application of FARA affects First Amendment rights, the government must make a compelling factual showing and establish its case by clear and convincing evidence. Although this argument might be appropriate in a discussion of proposed jury instructions, it has no place in the consideration of a motion for summary judgment."]; *J. C. Freeman v. Saxton*, 240 Ga. 309, 240 S.E.2d 708, 709 (1977) ["[q]uestions concerning the factual sufficiency of the evidence, i.e., whether the appellant has by clear and convincing evidence rebutted the presumption of gift and shown an implied trust, are for the jury"]; *Dugan v. First Nat. Bank in Wichita*, 227 Kan. 201, 606 P.2d 1009, 1014 (1980) ["[p]arty resisting a motion for summary judgment in an action based upon fraud need not present 'clear and convincing' evidence of fraud in opposing the motion."]; *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350, 355 (1982) ["While proof of an oral modification by clear and convincing evidence is the appropriate burden of proof at the trial of a matter, at the summary judgment stage the function of the trial court is not to weigh the evidence or to try the factual issues by whatever standard is appropriate to the case, but merely to determine whether or not there exists any genuine issue of material fact"]; *Collord v. Cooley*, 92 Idaho 789, 451 P.2d 535, 541 (1969) [Contention that summary judgment was properly granted because opposing parties failed to come forward with clear and convincing evidence "misconstrues the role of a summary judgment. The burden is upon the party moving for summary judgment . . . to establish that there is no genuine issue of material fact"]; *Credit Union of America v. Myers*, 234 Kan. 773, 676 P.2d 99, 106 (1984) ["The general rule is that fraud is never presumed and must be proven by clear and convincing evidence. [Citation] The trial court incorrectly applied the trial evidentiary standard to the motion for summary judgment"]; *Steadman v. Turner*, 84 N.M. 738, 507 P.2d 799, 801 (1973) ["Defendants confuse rules applicable to trials and rules applicable to

Amici in support of petitioners assert that application of the "clear and convincing" standard at the summary judgment stage in defamation actions is a matter of "virtual unanimity among the state and federal courts" (*Reader's Digest* Brief, p. 5). This is a misstatement of the law.

Indeed, the very authority cited by petitioners' *amici* belie their characterization of the "virtually unanimous" rule. In *Nader v. de Toledano*, 408 A.2d 31 (D.C. App. 1979), *cert. denied*, 444 U.S. 1078 (1980) (cited in Media *Amici* Brief, pp. 20-21, n. 15), the conflicts which exist concerning the standard of proof at summary judgment were carefully described and analyzed. The *Nader* court found that one line of cases, deriving from *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir. 1970), *cert. denied*, 398 U.S. 940 (1970), created a test which deviated from usual summary judgment procedure:

> First, rather than view this evidence in a light most favorable to the plaintiff, Judge Wright would have the trial judge evaluate all the evidence in its most reasonable light. Second, rather than ask whether a reasonable jury could find actual malice with convincing clarity, Judge Wright would require the trial judge to find actual

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summary judgments. At trial, the burden of establishing each element of fraud by clear and convincing evidence is upon plaintiffs" but no such requirement occurs at summary judgment]; *Floyd (J. L.) v. Industrial Development Board of City of Dothan*, 442 So.2d 927, 930 (Ala. 1983) [clear and convincing evidence is necessary at trial to prove abandonment by non-use, but plaintiff will survive motion for summary judgment by establishing genuine issue of material fact]; *Hibbs v. Chandler*, 684 S.W.2d 310, 312 (Ky. Ct. App. 1985) [while clear and convincing evidence is required at trial to prove paternity, such evidence is not required to survive motion for summary judgment].

> malice with convincing clarity if plaintiff is to survive a summary judgment attack. The *Wasserman* approach thus constitutes a two-prong departure from normal summary judgment law.
>
> *Id.*, at 46.

The *Nader* court then decided that normal rules apply at summary judgment without constitutional concerns as to the standard of proof:

> We are unpersuaded by Judge Wright's two-prong approach or by other courts' variations upon it. We feel either prong of the *Wasserman* procedure—and perforce both prongs in conjunction—impermissibly denigrates the traditional roles of judge and jury. Furthermore, we glean from *New York Times* and subsequent decisions that the Court envisions normal function of the jury in libel actions as in other civil actions. [Citations] Thus, we are of the opinion that at summary judgment the plaintiff is not required to prove to the court "actual malice with convincing clarity" as he must do at trial because that would of necessity require a weighing of evidence by the court. We find no hint anywhere from the Supreme Court, that the judge must himself be convinced.
>
> *Id.*, at 49. *Accord, Joseph v. Xerox Corp.*, 594 F.Supp. 330, 334, n. 5 (D.D.C. 1984).

Thus, the very case cited by media *amici* stands for the proposition opposite to their claim and, in fact, supports the holding of *Liberty Lobby*. Many other decisions show that the claim of petitioners is far from universally accepted.

Other courts have rendered decisions in accord with the decision in *Liberty Lobby*.[4]

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[4] See, also, *Clark v. American Broadcasting Companies, Inc.*, 684 F.2d 1208, 1212 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983) ["ABC suggests that different rules and considerations apply to summary judgment motions in defamation cases. However, the standard for summary judgment motions is articulated clearly in Fed.R.Civ.P. 56(c). [¶] There is no rule which favors either granting or denying motions for summary judgment in defamation cases.' [Citations] Therefore, even in defamation cases, summary judgment is proper only if there exists no genuine issue as to any material fact."]; *Pace v. McGrath*, 378 F.Supp. 140, 144 (D.Md. 1974) [making distinction that convincing clarity is burden required at *trial*, not summary judgment]; *Berkey v. Delia*, 287 Md. 302, 413 A.2d 170, 185 (1980) [clear and convincing test rejected at summary judgment level; "[w]hether Delia adduces clear and convincing evidence to support his action against Berkey must be determined by the trier of fact who will weigh, compare, test, and judge its worth"]; *DiLorenzo v. New York News, Inc.*, 81 A.D.2d 844, 432 N.Y.S.2d 483, 484 (1980) ["Concern for the First Amendment should not be transformed into a requirement that the plaintiff prove actual malice to the motion court"]; *Dienes v. Associated Newspapers, Inc.*, 137 Mich. App. 272, 358 N.W.2d 562, 568 (1984) [at motion for summary judgment "[w]e decline to hold that any 'benefit of the doubt' must go to the media defendant nor do we hold that plaintiff must come forward with clear and convincing proof that a genuine issue of fact exists with regard to malice"]; *Community Medical Services of Clearfield, Inc. v. Local 2665, American Federation of State, County and Municipal Employees, AFL-CIO*, 437 A.2d 23, 27 (Pa. Super. Ct. 1981) ["The import of the Guam decision is that the usual procedural rules should govern summary judgment and that a libel plaintiff need not prove malice twice—first to the judge, then to the jury."]; *Collins v. Brigman*, 428 So.2d 373, 374 (Fla. Dist. Ct. App. 1983) ["In order for a litigant to avoid a summary judgment he does not have to 'demonstrate with clear and convincing evidence that there is a genuine issue as to any material fact,'—even in a public official defamation case."].

Another case heavily relied upon by petitioners and their supporters is *Yiamouyiannis v. Consumers U. of the United States*, 619 F.2d 932 (2d

The *Liberty Lobby* court and the many courts which have ruled similarly are correct. There is certainly no reference in the language of the First Amendment itself to the special procedural protection petitioners seek; there is no indication that the framers of the Constitution ever envisioned such a special procedural protection. There is no apparent indication in any decision of this Court that the clear and convincing evidence standard must be applied at any stage prior to submission to the jury. In fact, this Court's decisions indicate the opposite. This Court unanimously held last year that there are no First Amendment concerns whatsoever in determining whether a particular court has jurisdiction over a defendant in a defamation action. *Calder v. Jones*, ___U.S___, 104 S.Ct. 1482, 1487 (1984). There is no First Amendment bar to inquiring during the discovery phase of the litigation into the editorial processes and state of mind of persons involved in the publication. *Herbert v. Lando*, 441 U.S. 153, 176 (1979). This Court has never held that the standard of proof on any issues other than actual malice in a libel case has any constitutional implications at all, including the proof of falsity, innuendo, colloquium and the fact of publication. Recently, a plurality of this Court held that presumed and punitive damages are not constitutionally prohibited in certain cases involving private individuals. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, ___U.S___, 105 S.Ct. 2939 (1985). This Court has never indicated that it is limiting a litigant's opportunity to have his case reach the jury.

Cir. 1980), *cert. denied*, 449 U.S. 839 (1980). However, a later decision characterized the portion relied upon as mere dictum which does not precisely set forth the rule on summary judgment motions in defamation cases. *Westmoreland v. CBS Inc.*, 596 F.Supp. 1170, 1179 (S.D.N.Y. 1984).

The new, extra protection which petitioners seek is a form of double counting, similar to that which has already been expressly rejected by this Court in a unanimous decision:

> Moreover, the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. See *New York Times, Inc. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). To reintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws. See, *e.g.*, *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) (no First Amendment privilege bars inquiry into editorial process). See also *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n. 9, 99 S.Ct. 2675, 2680 n. 9, 61 L.Ed.2d 411 (1979) (implying that no special rules apply for summary judgment).
>
> *Calder v. Jones, supra*, 104 S.Ct. at 1488.

The approach that Synanon and Mr. Dederich are suggesting regarding this procedural question on summary judgment is similar to the approach taken by this Court in *Herbert v. Lando:*

> The plaintiff's burden is now considerably expanded. In every or almost every case, the plaintiff must focus on the editorial process and

> prove a false publication attended by some degree of culpability on the part of the publisher. If plaintiffs in consequence now resort to more discovery, it would not be surprising; and it would follow that the costs and other burdens of this kind of litigation would escalate and become much more troublesome for both plaintiffs and defendants. It is suggested that the press needs constitutional protection from these burdens if it is to perform its task, which is indispensable in a system such as ours.
>
> Creating a constitutional privilege foreclosing direct inquiry into the editorial process, however, would not cure this problem for the press. Only complete immunity from liability for defamation would effect this result, and the Court has regularly found this to be an untenable construction of the First Amendment. Furthermore, mushrooming litigation costs, much of it due to pretrial discovery, are not peculiar to the libel and slander area. There have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus. But until and unless there are major changes in the present Rules of Civil Procedure, reliance must be had on what in fact and in law are ample powers of the district judge to prevent abuse.
>
> *Herbert v. Lando, supra,* 441 U.S. at 176-177. (Footnote omitted.)

The argument that defamation defendants are entitled to a particular standard of review in determining motions for summary judgment presupposes that defamation

defendants have a constitutional right to seek summary judgment in the first place. No such right exists. A state is free to provide or eliminate the summary judgment as an available procedure. Since defamation defendants have no constitutional right to a motion for summary judgment, they likewise have no constitutional right to a particular standard on a motion for summary judgment.

In presenting their arguments, petitioners and *amici* raise three other arguments which deserve some response: their attack on libel plaintiffs, their equating summary judgment with a directed verdict, and their attempts to distinguish between the criminal and civil standards.

Attack on Libel Plaintiffs

Petitioners and supporting *amici* resort to attacks on the character of The Synanon Church and other libel plaintiffs. Their attacks are based entirely on newspaper reports and other matters not properly before this Court. However, this willingness to engage in exaggeration and outright falsification about Synanon underscores how much the media are seeking a special procedural rule for their benefit. For example, the media *amici* cite two *Newsweek* articles for their argument that a "major newspaper group," The Hearst Corporation, paid a substantial settlement to get rid of certain costly, time-consuming litigation. The clear implication is that Synanon's litigation against the Hearsts was meritless. The truth is that in 1976 the Synanon plaintiffs received a $600,000 settlement with a front-page retraction from the Hearsts in a libel case and in 1978 $2 million for various torts of the Hearsts and their attorneys, including the burgling of Mr. Dederich's personal offices. These payments were obviously not mere nuisance value settlements.

There are also references in the briefs to Synanon being a "violent" organization based upon language in certain judicial decisions. In none of these cases was any ultimate fact decided regarding this issue. In the one case, the court only noted that evidence of such violence had been introduced, but declined to reach this issue; in the other, the court was only considering the sufficiency of the government's *prima facie* showing to compel a grand jury witness' testimony based upon *in camera* exhibits submitted by the government. The interpretations of the cases by *amici* are gross distortions and, moreover, these characterizations and unsupported allegations are completely irrelevant to any issue before this Court.

The view of petitioners reflects a cynical view of the role of courts and juries. To accept their argument, one must assume that courts will not act to prevent useless and harassing litigation and that juries will not follow properly drafted legal instructions.[5]

Synanon is alleged to have conducted a campaign to harass the members of the media, but these reports were generated by either the media themselves or organizations financed by and supporting the media organizations. The entire point of the defamation action by Synanon and Mr. Dederich against *Reader's Digest* is the opportunity to clear the worldwide defamation suffered by them at the hands of *Reader's Digest* and other multi-million-dollar,

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[5] The media *amici* argue that the high reversal rate of libel verdicts indicates that increased use of summary judgment is required. (Media *Amici* Brief, p. 24.) Exactly the reverse is true. The high reversal rate of libel verdicts shows that the media is already receiving an extraordinary degree of protection greater than that enjoyed by other civil litigants. Again, the media's position is, in essence, that the protection afforded by *New York Times Company v. Sullivan* is not good enough.

international media conglomerates. These huge commercial media enterprises, whose major purpose is to increase profits by selling more stories, would have this Court create a virtually impenetrable barrier to Synanon's and Mr. Dederich's efforts to take their case to a jury.

Comparison to Directed Verdicts

Media *amici* argue that the clear and convincing evidence standard must be employed in summary judgment motions because such a standard is applied in directed verdict motions and the two are "functionally equivalent" (Media *Amici* Brief, pp. 6-10). This argument ignores certain well-established and crucial distinctions between the motion for summary judgment and the motion for directed verdict.

Professor Moore points out that a significant distinction between the motion for summary judgment and the motion for directed verdict is that the party moving for summary judgment has a higher burden:

> As to certain issues the motion for summary judgment does, however, operate differently than the motion for directed verdict, since the party moving for summary judgment has the burden of establishing the lack of any triable issue of material fact, even as to issues upon which the opposing party would have the burden of proof at trial. And since the motions operate differently in point of time—the motion for summary judgment to foreclose a trial, and the motion for directed verdict after the opposing party has had full opportunity to present his evidence in court—this

> factor may be considered in the exercise of sound judicial administration.
>
> 6 J. Moore, *Moore's Federal Practice*, ¶ 56.23, 56-1393.

This distinction is crucial in the present case. At the time of a motion for directed verdict, after the evidence has been heard, it is proper to consider whether plaintiff has met his burden of establishing constitutional malice by clear and convincing evidence. Such is not the burden at the time of motion for summary judgment, where the burden is entirely upon the party moving for summary judgment, as the above-quoted language makes clear.

Another relevant distinction between the directed verdict motion and the summary judgment motion is that at the directed verdict stage it is proper for the trial judge to make credibility determinations:

> Yet a major difference between summary judgment and directed verdict is that credibility determinations may enter into the latter but not the former. Unlike a summary judgment motion, "a directed verdict motion typically would be made after the witness had testified and the court could take account of the possibility that he either could not be disbelieved or believed by the jury."
>
> *Agosto v. Immigration & Naturalization Service*, 436 U.S. 748, 770, n. 8 (1978) (Powell, J., dissenting).

To the extent that *amici* argue that their conclusion is compelled by some "functional equivalence" between the motion for directed verdict and the motion for summary judgment, their contention is without merit.

Analogy to Criminal Cases

The analogy used in *Liberty Lobby* of the "clear and convincing" evidence standard in libel cases to the "beyond a reasonable doubt" constitutional standard in criminal cases and the application of those standards in pretrial proceedings is a proper one. This excellent analysis derives further support from the decisions of this Court. In addition to the premise that "probable cause" is sufficient to take a criminal case to trial, this Court has held, concerning the preliminary inquiry in the criminal context, that there are no constitutional necessities that require the application of the higher "beyond a reasonable doubt" standard when dealing with the question of pretrial incarceration of a criminal defendant. *Gerstein v. Pugh*, 420 U.S. 103, 121-122 (1975). In *Gerstein*, this Court held that, although guilt in a criminal case must be proved beyond a reasonable doubt, a finding of probable cause is all that is required under the Fourth Amendment to incarcerate a criminal defendant before trial. *Id.*

Why should libel defendants be afforded far greater pretrial protections than presumptively-innocent, individual citizens confronted with pretrial loss of liberty and the hardships and severe consequences of a criminal proceeding? In criminal cases, due process only requires a finding of "probable cause" before trial. Certainly, libel defendants, who face far less severe consequences in going to trial in a libel case, should not be afforded the protection of a higher standard of proof prior to trial.[6]

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[6] The media *amici* attempt to counter the analogy by suggesting that the criminal preliminary hearing occurs before the prosecutor has engaged in any discovery, while the motion for summary judgment follows discovery. This is meritless. Usually a prosecutor will have

II

IT IS NOW URGENT FOR THIS COURT TO STATE CLEARLY AND UNEQUIVOCALLY THAT STATES HAVE A VALUABLE, RECOGNIZABLE INTEREST IN PROTECTING THE REPUTATIONS OF THEIR CITIZENS, THAT THERE IS CONSTITUTIONAL VALUE IN ALLOWING CITIZENS TO TAKE TRIABLE QUESTIONS OF ACTUAL MALICE TO A JURY, AND THAT MOTIONS FOR SUMMARY JUDGMENT IN LIBEL CASES ON THE ACTUAL MALICE QUESTION ARE GENERALLY DISFAVORED BECAUSE THEY CALL INTO QUESTION THE STATE OF MIND OF THE CENTRAL WITNESSES

It is respectfully submitted that this Court should now strongly hold that motions for summary judgment in libel cases on the actual malice question are to be treated in the same manner as other state-of-mind matters, and are therefore disfavored. This Court has provided excellent, clear explanations of the motion for summary judgment purpose and procedure which should be the standard in defamation cases:

> Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case "show that [except as to the

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completed his investigation before filing charges, and the prosecution typically conducts little or no discovery after the preliminary hearing.

> amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed. Rules Civ. Proc., 28 U.S.C.A. This rule authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, • • • [and where] no genuine issue remains for trial • • • [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 64 S.Ct. 724, 728, 88 L.Ed. 967 (1944).
>
> *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962).

It is a well-established principle that questions of state of mind of a witness do not readily lend themselves to resolution by summary judgment. *Id.*, at 473. It is now time for this Court to articulate a clear recognition that state of mind issues are inherent in the *New York Times* test, and that these subjective tests require that summary judgments should be rare.

The right of plaintiffs to bring defamation suits to clear their reputation is a vital one. It is absolutely essential in our democracy that individuals, even those who risk speaking out against the established norm, be protected from irresponsible attacks by the media. People wronged by irresponsible media have a right to some recourse, and defamation actions are the only realistic recourse possible. It is imperative for this Court to prevent other courts from misreading the First Amendment to denigrate that right. The media's claim of a "chilling effect" from protracted litigation is baseless. In fact, the reverse is true. Defamation

plaintiffs are the ones who are "chilled." The enormous resources of media defendants are brought to bear against any who dare to sue them.[7] There are no signs that the instigation of litigation deters the media at all. For example, even after Synanon filed suit against Reader's Digest Association, Inc., *Reader's Digest* republished the article sued upon in its foreign editions (Synanon Pet. for Cert., pp. 22-23). In no way was *Reader's Digest* "chilled."

According to the cover of *Reader's Digest*, over 30 million copies are sold every month at a cover price of $1.25. The richest, most powerful parties in a libel suit are generally the defendants. Libel defendants are better able to insure against the costs and eventual judgments of their tortious conduct. Libel defendants in both the *Liberty Lobby* and *Synanon* cases are publishing for commercial, financial advantage. It is the libel defendant, not the plaintiff, that has the pecuniary interest; sensationalized stories sell the best. Therefore, this Court should act to protect the rights of citizens to seek redress for injury to their reputation and to have their legitimate claims reach a jury.

Unless this Court firmly states that summary judgments on the actual malice question are disfavored, defamation defendants will continue to make inroads on the legitimate rights of plaintiffs. The position of the petitioners would require a trial court to weigh evidence and test credibility on a motion for summary judgment in a libel case. As this Court cogently explained in *Addington v. Texas*, 441 U.S.

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[7] For example, in one slander case brought by Synanon against American Broadcasting Companies, Inc., two officers of Synanon were each subjected to over 30 days of deposition. Defamation defendants are renowned for imposing such oppressive discovery burdens.

418 (1979), the difference between clear and convincing evidence and a preponderance of evidence is one of degree, requiring a weighing process to distinguish:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring).
>
> The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.
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> Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.
>
> In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk

of error upon itself. This is accomplished by requiring under the Due Processs Clause that the state prove the guilt of an accused beyond a reasonable doubt. *In re Winship, supra.*

The intermediate standard, which usually employs some combination of the words "clear," "cogent," "unequivocal," and "convincing," is less commonly used, but nonetheless "is no stranger to the civil law." [Citations] One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases. [Citations]

Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests or the nuances of a judge's instructions on the law may well be largely an academic exercise; there are no directly relevant empirical studies. Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be unknowable, given that factfinding is a process shared by countless thousands of individuals throughout the country. We probably can assume no more than that the difference between a preponderance of

> the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence. Nonetheless, even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a "standard of proof is more than an empty semantic exercise." [Citation] In cases involving individual rights, whether criminal or civil, "[t]he standard of proof [at a minimum] reflects the value society places on individual liberty." [Citation]
>
> *Id.*, at 423-425.

As *Addington* teaches, the difference between "preponderance," "clear and convincing," and "beyond a reasonable doubt" is a matter of degree — a matter of how much weight the factfinder is to give to the evidence. Petitioners would have this Court interpret the First Amendment so as to require trial courts to drag into the motion for summary judgment procedure the debate as to what amount or type of evidence is sufficient to resolve a disputed question of material fact by clear and convincing evidence. That resolution requires a weighing of evidence and testing of credibility of witnesses, and is completely inconsistent with normal summary judgment procedures. Indeed, the rule urged by petitioners would require the trial court to grant a defamation defendant's motion for summary judgment even if a plaintiff comes forward with a preponderance of the evidence on the issue of actual malice.

A firm statement from this Court is required to counter the confusion created by petitioners and their supporters regarding the nature of the summary judgment inquiry. As conceded by *amici*, the elements of the inquiry are "that the

contested fact be material and that the dispute be genuine." (Media *Amici* Brief, p. 8.) Thus, the court has only two inquiries. The first is whether the allegedly disputed fact is material, i.e., whether resolution of the fact could prove or disprove an element of the case. The second inquiry is whether the dispute is genuine. This does not mean that the court needs to weigh the relative merits of the sides in the dispute; indeed, the trial court is forbidden to do so. The only inquiry properly before the trial court is whether or not the dispute is genuine.

If this Court does not use this opportunity to reject firmly the position urged by petitioners and their supporters, defamation defendants will continue to argue that summary judgment determinations in libel cases are a matter of federal constitutional law potentially subject to review by this Court. This Court would find it necessary to resolve repeatedly the meaning and scope of this new procedural right. For example, it would be essential for this Court to accept the *Synanon v. Reader's Digest Association* petition for certiorari to resolve what issues lower courts must consider in the "clear and convincing" evidence test and what weight should be given to evidence upon those issues. A striking example exists in the *Synanon* case, where the California Supreme Court minimized the dispute wherein *Reader's Digest's* sources deny saying that which the author claims they said (Synanon Pet. for Cert., pp. 23-24). If the clear and convincing evidence standard is not clearly rejected, courts will be required to wrestle with the weight to be given to the conflicting evidence, as the California Supreme Court did. There are many other examples. This Court would be called upon to resolve how much weight should be given to evidence that the defendant deleted pertinent facts that contradicted the defamation (Synanon Pet. for Cert., p. 19); evidence of predisposition to publish a

defamatory article (*Id.*, p. 20); evidence of failure to contact the subject of the story or persons associated with it (*Id.*, p. 21); evidence of failure to corroborate sources when the story did not constitute "hot news" *(Id.);* and evidence of publication of the defamation after receipt of a demand for retraction (*Id.*, p. 22). In the *Synanon* case, the evidence introduced in the summary judgment motion was considered sufficient by the trial judge to raise a triable issue of fact. The evidence was considered insufficient under the "favored remedy" approach taken by the California Supreme Court. Under petitioners' approach, this Court will ultimately have to decide how much weight should be given to such evidence and whether it meets the proposed new constitutional standard at the summary judgment stage.

A rule allowing courts to use a clear and convincing evidence standard at summary judgment will cause an extreme distortion of the discovery process. At a trial, a plaintiff can call a witness and confront him with all contradictions which may have been developed in the course of discovery. This is impossible to achieve in the discovery process itself, since witnesses deposed in the early stages of discovery cannot be confronted with later-developed facts. Actual malice can rarely be proven directly, since defendants will usually vouch for their own good faith. *Herbert v. Lando, supra,* 441 U.S. at 170. Therefore, it is usually essential for the plaintiff to establish actual malice by accumulated circumstantial evidence, which can be weighed against the defendant's denials. Such weighing is properly performed by a jury. Under petitioners' view, trial courts will be resolving factual disputes using an inadequate record, insufficient cross-examination, and extremely truncated and limited discovery. For example, in the *Synanon v. RDA* case, petitioners filed an affidavit

detailing eight depositions which were needed to oppose the motion for summary judgment; the California Supreme Court apparently did not find this affidavit in the file and concluded no need for further discovery had been shown. (Synanon Pet. for Cert., pp. 9-10, n. 8.) The trial court did not have to reach the discovery issue since it had denied the motion for summary judgment, but under the California Supreme Court's favored remedy and clear and convincing evidence standard, which caused the termination of the *Synanon v. RDA* libel suit, the question of whether Synanon and Mr. Dederich were unconstitutionally denied sufficient discovery is fundamental.

Moreover, a clear statement that libel summary judgments are disfavored will serve to keep this Court from being embroiled in other constitutional questions. For example, must trial and appellate courts cumulate inferences and circumstantial evidence to deny the motion for summary judgment, as in all other summary judgment proceedings? This issue is directly apparent from the *Synanon v. RDA* case (Synanon Pet. for Cert., pp. 17-19) and cries out for resolution therein if this Court were to allow for the clear and convincing evidence standard requested by petitioners in this case.

Thus, unless this Court gives a direct statement of the disfavored status of summary judgments on the actual malice issue, most perplexing constitutional matters are potentially raised, all of which are set forth in Synanon's petition in response to the California Supreme Court's position that summary judgment is a favored remedy.

A clear statement of this Court will unambiguously determine that defamation defendants are not entitled to special protections at the pretrial stage. Although

petitioners repeatedly claim they seek no special rules,[8] elsewhere they admit that special protection is indeed what they seek.[9]

In effect, petitioners' argument is that the Constitution requires the creation of a heavy presumption that libel defendants have not engaged in tortious conduct and that this heavy presumption must be adhered to at all stages of the proceedings to create unique hurdles for libel plaintiffs.

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[8] Pet. Brief, pp. 8-9 [*Liberty Lobby* decision creates special rule disadvantaging libel defendants on summary judgment], p. 9 [neutral summary judgment rule implies no special protection for libel defendants], pp. 13-19 [normal summary judgment rules apply to libel cases]; *Reader's Digest* Brief, p. 5 [only normal summary judgment procedures apply], p. 12 [no special procedural rules apply at summary judgment stage of libel cases], p. 14 [the manner of considering the evidence is the same as in any other summary judgment case], p. 17 [neutral approach to summary judgment applies as in any other case]; Media *Amici* Brief, p. 3 [normal rules require that elevated standard of proof needed at trial must also apply at summary judgment], p. 16 [settled principles of summary judgment apply], p. 18 [*Hutchinson v. Proxmire, supra*, mandates application, in libel cases, of normal summary judgment procedures].

[9] In direct contradiction of the statements set forth in the preceding note, petitioners and their supporters repeatedly refer to the special protection necessary for libel defendants at summary judgment. See, e.g., Pet. Brief, p. 9 [special need for independent judicial scrutiny at summary judgment stage of public-figure libel cases], pp. 24-26 [constitutional question in libel cases is "of the most sensitive and delicate kind" and should not be left to the trier of fact]; *Reader's Digest* Brief, pp. 2, 6-8 [chilling effect of libel litigation mandates special constitutional protection at all stages of proceedings], p. 12 [substantive constitutional limitations on libel law must be applied at summary judgment in order to make constitutional protections effective]; Media *Amici* Brief, p. 3 [freedom of speech requires special protection at pretrial stage], p. 28 [First Amendment rights require application of heightened standard of proof at summary judgment].

Petitioners and their supporters argue that this is the conclusion mandated by *New York Times*.

The present case offers this Court an excellent opportunity, which it is respectfully submitted should be taken, to examine and modify the decision in *New York Times Company v. Sullivan*; however, such a drastic approach is not required, because *New York Times* does not mandate a clear and convincing evidence standard at the summary judgment stage. Instead, petitioners and their supporters should be denied the new, extraordinary protection which they are requesting, and it is further respectfully submitted that it is now urgent for this Court to issue a clear, unequivocal holding that summary judgments are disfavored on the actual malice issue in defamation cases.

CONCLUSION

For the foregoing reasons, the decision of the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3530 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, August 16, 1985, I served the within MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS, AND BRIEF OF AMICI CURIAE THE SYNANON CHURCH in re: "Jack Anderson vs. Liberty Lobby, Inc." in the U.S. Supreme Court, October Term, 1984, No. 84-1602;

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER David J. Branson, 1575 Eye Street, N.W. Washington, D.C. 20005;

LIBERTY LOBBY, INC., Fleming Lee, 300 Independence Avenue, Washington, D.C. 20003;

PILLSBURY, MADISON & SUTRO, Walter R. Allan, 225 Bush Street, P.O. Box 7880, San Francisco, CA 94120; (1 copy)

PATTERSON, BELKNAP, WEBB & TYLER, Robert D. Sack, 30 Rockefeller Plaza, New York, New York 10112; (1 copy)

AMERICAN LEGAL FOUNDATION, Suite 300, 1705 "N" Street, N.W., Washington, D.C. 20036; (1 copy)

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on August 16, 1985

at Los Angeles, California.

Kathleen Kelly